Supreme Court of the United States.

No. 242. OCTOBER TERM, 1898.

KENT K. HAYDEN, AS RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,

Appellant,

against

CHEMICAL NATIONAL BANK,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States.

NO. 242. OCTOBER TERM, 1898.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska,
Appellant,

AGAINST

CHEMICAL NATIONAL BANK,
Appellee.

BRIEF FOR APPELLEE.

Statement.

The bill in this cause was brought by the complainant, as Receiver of the Capital National Bank, to recover of the defendant, the Chemical Nationa Bank, certain sums of money remitted, as payments, by the Capital National Bank to the Chemical Bank (R. 1–2). The Capital National closed its doors at the close of business hours on Saturday, the 21st day of January, 1893, and the bill alleges that from June, 1884, to the 21st day of January, 1893, it "was engaged in the business of banking" (R. 1). The bill then proceeds to allege that on that day the bank

was insolvent; that on the 22d day of January, 1893, the Comptroller of the Currency was satisfied of the insolvency of the bank; that on the 6th day of February, 1893, a receiver was appointed; that the insolvency of the bank was known to its officers; that there were extensive dealings between the two banks; that the defendant, on and after January 21, 1893, refused payments of all drafts made upon it by the Capital National; and that since the 22d day of January, 1893, the defendant has received certain sums of money "belonging to and for the account of" the Capital National Bank. The sums specified amount to $11,486.39.

Section 5242 of the U. S. Revised Statutes, is the only authority for bills of this character. But the bill nowhere alleges "an act of insolvency" nor that the payments were made "in contemplation of insolvency," nor that they were "made with a view to prevent the application of its assets," as provided by law, nor that they were "made with a view to the preference of one creditor to another."

The defense is that the Capital Bank, being indebted to the Chemical Bank, made these remittances and payments on account of such indebtedness, and that they were so made by the Capital, and received by the Chemical in the usual course of business (Answer, R. 5). The pleadings and the evidence show an active course of dealings between the two banks. The account rendered by the defendant in the course of its dealings with the Capital Bank and put in evidence by the complainant (R. 9–19), opens with a debit against the Capital National of $49,388.51, and closes with a balance of $13,317.94 against the Capital National. This is after crediting the Capital National with all the payments (R. 18–19) now sought to be recovered back by the Receiver, so that, without those payments, the balance in favor of the Chemical against the Capital would be $24,804.33 on January 24, 1893.

For the purpose of the hearing of this cause, in the

Circuit Court, it was stipulated that the proofs filed in the cause of Kent K. Hayden against George G. Williams and John E. Dodd might be used in this cause, subject to all legal objections taken when the witnesses were examined, and subject to any additional objections that might be interposed at the hearing, except the objection that the books of the Capital Bank were not put in evidence, and all objections may be urged at the hearing without previous motion or order to settle or suppress (Stipulation, R. 9).

The Receiver was the principal witness, and his evidence is mere opinion and not a statement of facts.

He speaks as of the time when he was testifying, long after the suspension of the Capital National Bank.

It only shows what the Receiver thought the securities were worth when he testified, without showing as fact what they were worth when taken, or that the bank ever knew they were worth less than par.

It does not tend to show that the debts were not perfectly good when contracted, nor does it show that the borrowers were not then solvent, and the securities not then good.

Instead of facts, the *opinion* of the witness is elicited as to *past* transactions, that opinion being based wholly on his *present* opinion of assets, without any knowledge of *facts*, as they existed when loans were made, and without having legally proved, by judgment and execution, that present holdings were not collectible.

It does not prove, nor tend to prove, that the bank knew the borrowers were not solvent, or the securities not good, when the loans were made.

Even if the borrowers were then insolvent and the securities bad, it does not prove or tend to prove that the bank knew it.

The force of these objections is well illustrated by the witness himself when he says : "I do not know

the value of the notes at the time they were discounted by the bank" (R. 60), which refers to notes described at pages 26–28. And see the Receiver's testimony that up to the closing of the bank: "These gentlemen and each of them were considered worth from $100,000 to $250,000" (R. 64.). In the light of such evidence as that, the mere fact that the bank was *mistaken*, and could not collect the obligations of those men, instead of showing a contemplation of insolvency, shows exactly the contrary.

At pages 32, 35, 39, 40, 52, 56 and 58 of Record transactions and entries are elicited varying from three to ten years before the Capital Bank failed.

It is impossible, in the nature of the banking business, that such things, or anything, done in 1883, 1884 and 1885, as between the Capital Bank and parties other than the Chemical Bank can show, or tend to show, any intent on the part of the Capital to prefer the Chemical, and to make that preference in contemplation of insolvency in 1893.

The opinion of Circuit Court (WHEELER, *J.*) dismissing bill is found (R. 116–118), and the opinion of the Circuit Court of Appeals (R. 121–124).

POINTS.

I.

The bill of complaint should have been dismissed for want of equity, *there being no allegation of any act of insolvency, nor contemplation of insolvency, nor of intent to prefer, nor of intent to prevent the application of assets.*

When there is in the record any sufficient ground to sustain the decree below, it will be affirmed whether the reasons given by the Court below be sufficient or not.

The clause of the National Bank Act (Section 5242, U. S. Rev. Stats.) under which complainant seeks to recover is as follows: "All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made *after the commission of an act of insolvency*, or in *contemplation thereof*, made *with the view to prevent* the application of its assets in the manner provided in this chapter, or *with the view to* the *preference of one* creditor to another, except in payment of its circulating notes, shall be utterly null and void."

The mere fact of insolvency, if it existed at the time of the transfer, is of no consequence whatever. A bank may be insolvent and the directors or the officer making the payment or transfer may not be aware of the insolvency. Or, it may be insolvent and the directors and officers may all know that fact, and yet honestly make the payment or transfer in the reasonable and honest hope of continuing business. So that insolvency coupled with knowledge of insolvency is not sufficient to sustain a recovery.

Two facts must concur:

I. —The payment or transfer must be made "after an act of insolvency, *or* in contemplation thereof."

II. —It must also be made "with the view to prevent the application of its assets * * * *or* with the view to the preference of one creditor to another."

Making the payment or transfer after an act of bankruptcy, or after the contemplation of bank-

ruptcy, is not sufficient. It must also be done for the purpose either of preventing the application of its assets, as provided by law, or to prefer one creditor to another. There must be an intended preference made after the act of bankruptcy, or in contemplation of insolvency. We say *intentional* preference, because the mere fact or subsequent *event* that the payment or transfer *results* in a preference, or in preventing the statutory application of the assets, is immaterial. The words "with the view" mean with the deliberate intention. Without such intent at the time of the payment or transfer it is not unlawful, and the fact that a preference has resulted cannot have relation back, and make the payment unlawful when made. Neither can the intent be inferred from an *act* of insolvency, much less from the mere fact of actual insolvency. The intent is a fact to be affirmatively proved.

The presumption of law is always in favor of the regularity and the legality of official conduct. The contrary must be both alleged and proved. If an act of insolvency occurring after the payment or transfer may be taken as sufficient proof that the insolvency was at the time known or contemplated, and if from this *inference* we may *further infer* the intent to prevent the application of assets, or to prefer a creditor, *then every payment made by a national bank is received at the hazard of having restitution enforced by a future receiver* should it be *thereafter* discovered that the paying bank was insolvent *when* the payment was made. The Statute of Limitations would be the only bar, and its application is uncertain. It was not the intention of the law to have all payments and transfers by national banks hung up indefinitely for future investigation of the past condition of the paying bank, and for the operation of inferences of intent, without further proof. Such an incubus, such a vast unknown contingency, constantly hanging over the banking business, would be wholly intolerable.

The principal contention of counsel for complainant is that the Capital Bank had been insolvent for some time before the payments now in question, and that the bank's officers must have known the fact. If the insolvency were admitted the alleged or inferred knowledge of the fact would not follow. Many banks and firms have in good faith and reasonably believed they were solvent, and could continue in business, when the event has proved they were not, and that it would have been better for all concerned if liquidation had been sooner commenced.

It cannot possibly be contended that there was any "act of bankruptcy" by the Capital Bank prior to the payments mentioned in the bill. They were all remitted by that bank, or by it ordered to be remitted by other banks, before it closed.

Can its closing a few days after the remittances were made, or ordered to be made, be held, *per se*, proof of a *contemplation* of bankruptcy *at the time* the payments were remitted or ordered to be remitted? Nothing is more familiar to the business world, so familiar that courts may take judicial notice of it, than the suddenness with which honest and discreet bankers and business firms sometimes discover their insolvency and that the business cannot be continued. The operations of a day or an hour may disclose the fact. A telegram of three words, touching a single asset which has been relied upon, may precipitate the crisis and force the conclusion that suspension is the only honorable course left.

It does not devolve on the Chemical Bank to prove that the Capital Bank was acting reasonably, honestly or lawfully. The burden is on the complainant to prove unlawful conduct, to prove certain facts and certain acts, accurately described in the statute. Nor is this enough. He must go further *and prove the motive, the unlawful intent*, with which those acts were done.

"The term 'insolvency' as used in this section,

has the same meaning it had in the national bankrupt law; that is, it does not mean an absolute inability to pay at some future time, upon a settlement and winding up of the bank's affairs, but 'a present inability to pay in the ordinary course of business.'"

Case *vs.* Citizens' Bank of Louisiana, 2 Woods, 23.

Such inability of the Capital National has not only not been proved, but is *disproved by the admitted fact that it conducted its business and paid all claims up to the hour of closing* (see Stipulation, R., 9).

The infirmity of complainant's contention is, that because, after these payments were made, there came a "future time" when the bank's "absolute inability to pay" became manifest, therefore it was unable to pay, and was insolvent when it did pay. It can better be said that the fact of payment shows ability to pay, and payment being actually made, the burden is on complainant to show two things, *contemplation* of insolvency and *intent* to prefer *when* the payments were made. Instead of *presuming* an unlawful motive, it would be far more natural and just to suppose that when the payments were made the Capital Bank fully believed it could go on in business, and afterwards discovered that it could not do so.

In Hayes *vs.* Beardsley, 136 N. Y., 299, the facts are stated as follows: Defendant (at that time a director of the bank) held three certificates of deposit bearing six per cent. interest. The cashier, learning that the other directors did not wish to pay so large a rate of interest, paid two of the certificates out of the "assets" of the bank. The other was paid in money, on presentation, to another bank, the holder. The bank at the time of these payments was in fact insolvent, and had been for years, but this was known only to the cashier; it

was in good credit and had committed no act of insolvency and paid all its obligations as they became due or were demanded, for six weeks after the last of said payments were made; just as the Capital Bank, by the allegations of the bill and the stipulated facts, is shown to have paid all claims presented up to closing the bank at the close of business hours on January 21, 1893.

The Court of Appeals, at page 303, say: "There was no *satisfactory evidence* that these payments were made by the bank to prevent the application of its assets in the manner prescribed by the National Banking Act, or with a view to a preference of the defendant over the other creditors of the bank."

This is a distinct judicial determination that something more must be shown than payment and insolvency at the time of payment. The *intent to prefer* must be affirmatively proved. In the case at bar *such an intent is not even averred in the bill.* It is averred that the bank was insolvent on the 15th day of January, six days preceding the closing of the bank, and that such insolvency was known to its officers and directors. If intent could be inferred from these allegations (the decisions are otherwise), yet even these allegations are not proved in the case at bar.

In Hayes *vs.* Beardsley (*supra*), the New York Court of Appeals proceeds to say: "The circumstances under which the payments were made and the condition and credit of the bank at the time forbid the inference that the payments were made for such a purpose. The defendant was not selected as a favored creditor. *During all the years of the insolvency of the bank* all creditors were treated alike, and there was no preference of one over another. All its demands were met at maturity. *There does not appear from the facts found to be any better ground for claiming that these payments made to the defendant were void than there is for making the same claim in reference to the numerous payments made in the regular course of business by the bank*

to its customers during MANY MONTHS *prior to the closing of its doors.* In order to uphold a recovery in an action like this there should be some *satisfactory evidence* that the cashier or other officer actually paid the money of the bank *in contemplation of insolvency* for the *purpose of giving a preference* to the payee, and with a view to prevent the application of the assets of the bank to the creditors generally, as provided in the National Banking Act." * * * "The fact that the defendant, entirely ignorant of the insolvency of the bank, was a director, does not, under such circumstances, as matter of law, charge him with liability for the payments made to him" (p. 304). In that case not only was the defendant a director, which fact plaintiff contended charged him with notice, but besides this fact, payment of two of the certificates had been made to him mainly by the transfer of negotiable securities of the bank, only a small difference being paid in money (p. 301). This fact might have been held to indicate some solicitude on his part, and inability on the part of the bank to pay in money. But the Court held that there was no proof whatever of intent to prefer.

Has the complainant, as Receiver of the Capital Bank, sued the various depositors who had accounts with that bank, to recover the sums paid out on their checks between the 15th and 21st days of January? Those deposits were debts, and their payment, with intent to prefer, would be quite as subject to the operation of the statute as the payment of an indebtedness to the Chemical Bank, a lending correspondent. It is not even pretended that he has done so; but if this suit is well brought, then he is giving such depositors a "preference" quite as void and unlawful as the one he now tries to fasten upon the payments to the Chemical.

In *Robert* vs. *Hill* (23 Fed. Rep., 311, opinion by Wheeler, *J.*), the plaintiff was Receiver of a broken

bank and the defendant one of its depositors. "There was a run on the bank by depositors which alarmed them. He did not want his money, but wanted to be secure. The officers guaranteed his deposit personally, and turned out this note (bank asset) *to pacify him.* He was dealt with as any other creditor *equally importunate* would have been. There was no intent to favor him over others. Their motive was to retain the money. Had he received the money he would have been equally liable to refund that, as has been shown." * * * They were striving to save the bank and not to help him at the expense of others (p. 312). * * * "Their apprehension of the condition of the bank (*i. e.*, contemplation of insolvency), and *motive to prevent suitable distribution of the assets ought to be made to appear clearly* in order to justify going so far back as to the time of its pledge and opening all pledges and payments on past debts; and their purpose and acts are to be considered in view of what they could see *looking forward*, and not wholly by what is apparent now by *looking backward.* * * * The actual condition was *as good as it had been for some time. They must have known that it was perilous*, but do not appear to have lost courage or then to have expected failure. The evidence *does not satisfactorily show* that they were placing money and securities where they would be kept from the effect of failure, but rather does show that they were using their assets to prevent failure" (pp. 312–313).

The bill was ordered to be dismissed.

Upon a rehearing a different conclusion was reached (23 Blatch., 312; 24 Fed. Rep., 571) by Wallace and Wheeler, *JJ.*, but it was placed upon the ground that there had very recently been a severe run upon the bank; that the depositor knew this "*and was unwilling to allow his money to remain without security*" (p. 315), and that the depositor "*took the transfer with a view of obtaining a pref-*

erence over the other creditors of the bank" (p. 316). This seems to have been a controlling consideration; for the Court, at page 317, proceeds to say: "A case may be supposed where a bank is *hopelessly insolvent and is known to be so by its officers*, and where any payment made by it will, as they know, *necessarily result* in a preference to the person receiving it; and yet, if made in the *ordinary course of business*, as for instance, to a customer who, in ignorance of the condition of the bank, continues his dealings and makes daily deposits, and draws out checks daily, it would be extremely inequitable to compel the latter to pay it back. * * * But the transaction *on the part of McGregor* was not an ordinary one. It is extremely unusual for a depositor of a bank to demand security as a condition of allowing his money to remain." Judge Wheeler says: "Insolvency is not enough; the statute does not make transfers after insolvency void. There must be an act of insolvency, or such a state of insolvency, as an existing fact, as to make it apparent that the creditors cannot be paid in full, and that a distribution of assets among the creditors will take place." If an intent to prefer can be construed to be an act of insolvency, which has never been decided, then proof of such intent is wholly absent in the case at bar. The Chemical was no more preferred by these remittances several days before suspension, than were the depositors whose checks were paid an hour before suspension. It was all done in the usual course of business. All these elements, the run, the alarm, the demand, the putting off and the subsequent demand of security and obtaining it, are absent in the case at bar, which is one simply of remittances "made in the ordinary course of business." The remittances in this case were made *voluntarily* by the Capital Bank. The Chemical Bank was not urging, had not asked for payment, or remittances, or for security. And at page 315 it is correctly said: "Insolvency as ordinarily defined, is that condition of affairs in which

a merchant or business man is unable to meet his obligations as they mature in the usual course of his business. An act of insolvency takes place when this state of affairs is demonstrated, and the merchant *has actually failed to meet some of his obligations.*" That is just what had occurred in that case, while nothing of the kind ever occurred in the present case. That case, as finally decided, is no authority for the complainant here.

See also to same effect:

Dutcher *v.* Importers and T. Bank, 59 N. Y., 5.
Utley *v.* Smith, 24 Conn., 310.
Tiffany *v.* Lucas, 82 U. S., 410 (21 L. Ed., 198).

National Bank *vs.* Colby, 21 Wallace, 609, involved only the validity of an attachment, and has no application to the present case.

Nor is there anything in the National Security Bank *vs.* Butler, 129 U. S., 223, contrary to the position now contended for, or that in any degree sustains the complainant's bill. In that case there was a transfer of assets to a creditor "*after* the directors "had voted that the bank should go into liquida-"tion, and should be closed, and that a receiver "should be appointed." If that did not show an intent to prefer, it clearly did show an intent to prevent the transferred assets from coming into the hands of the Receiver. Nothing at all similar to this was done in the case at bar. On the contrary, the Capital Bank continued to pay all demands, as usual, after these remittances were made, and all of the remittances to the Chemical Bank were made in the usual course of business some days before the Capital Bank was closed, and not an asset was touched or remitted after it closed.

II.

The Circuit Court of Appeals affirmed the *dismissal on the merits*. The decree was right, even had the bill been good on its face.

The suit of Hayden against Williams and Dodd, the evidence in which, subject to objections, is used in the case at bar, was to recover *dividends*, previously paid by the Capital Bank to *stockholders*, upon the ground that they were paid out of capital, and not out of earnings. In the present case the object of the bill, and the issues, are entirely different. In this case the bill is by the Receiver of the suspended Capital Bank to recover back from the Chemical Bank *payments to a creditor* made by the Capital Bank before suspension. Plaintiff can recover only upon the ground that the payments were made, either after an act of insolvency, or in contemplation of insolvency, *and* with the intent to prefer that creditor, the Chemical Bank. The wide difference between the two cases is easily perceived.

In the case at bar there is not only no "act of bankruptcy" either alleged or proved, but there is no attempt to prove it. Not only did the bank continue its ordinary business up to the close of banking hours on January 21, 1893, but there is not even a suggestion that it had failed to pay any depositor on demand, nor that any obligation of that bank had been protested, or not met at maturity. The fact that on the 17th January, 1893, one of its *own drafts* on the Chemical had not been honored is no act of bankruptcy. It was not a draft on the Capital, nor any promise by that bank. It was simply a request for a further advance, in other words, to borrow money, which was declined by the Chemical. The transaction is entirely consistent with the absolute solvency of the Capital Bank. It has never been held that the failure of a trader or a bank to obtain credit and accommodation was an

"act of bankruptcy," nor any proof of insolvency or contemplation of insolvency. There being no act of insolvency in the case, there can be no recovery by the plaintiff, without a finding that the payments to the Chemical Bank were made in contemplation of insolvency and with an intent to prefer the Chemical.

III.

The attempt in this case is to base a recovery upon the following alleged facts and inferential reasoning: (1) The Capital Bank was insolvent when the payments were made; (2) the officers of the bank knew it was insolvent, because they *ought* to have known that fact; (3) the payments being made with such knowledge, were made in contemplation of insolvency, and (4) being made in such contemplation, they were made with intent to prefer.

Counsel for defendant has here attempt to state the Receiver's case fairly and has stated it as strongly as he knows how to do. If there is only one break in the four steps of assumed facts, and the inference to be drawn therefrom, the complainant has no case.

(1.) The whole aim of the proofs is to show bad management of the bank and to show dishonesty of the bank's officials as between themselves and the bank. If the bad management and dishonesty be admitted, yet it may safely be affirmed that insolvency is not proved at any particular time, prior to closing, except in the light of subsequent events and facts *a light thrown backwards upon an actual condition then existing but not then known.* In the same way all the best trust companies and savings banks are insolvent to-day, if future developments

should show that the United States Government and many of the principal cities and railroads, whose bonds those institutions hold, *are now* insolvent, though not now known to be so.

(2.) If the Capital Bank was actually insolvent *when* these payments were made to the Chemical Bank, there is not one particle of evidence in the whole case to show that, as matter of fact the officers of the bank *knew* it was then insolvent. An inference, an argument they "ought to have known," do not meet either the requirements of reason or of the law.

(3.) Therefore the whole argument that the payments were made in contemplation of insolvency falls. What is "contemplation" as used in the statute? Is it contemplating, in the sense of considering, a seen and known fact? Or is it expecting, foreseeing and fearing that fact will occur in the future? If either sense be sufficient, then as between a bank *discovered* to be insolvent on the 21st of January, and a creditor, whose payments were remitted before that time, every legal presumption should obtain that officers have discharged their duty, and did not *know or believe* that they could not continue the operations of the bank until they actually closed it at the close of business hours on the 21st. Nothing but the strongest and most convincing proof should require an honest creditor, once paid, to refund the money, because of a state of facts, indeed a *state of mind*, which the creditor did not cause and could not control.

(4.) Equally falls the inference that if there was a "contemplation" of insolvency, the payments must have been intentional *preferences*. The law requires *both* the contemplation and the intent to prefer. If one were sufficient, the law would have named but one. There may be contemplation, in the sense of fearing, having reason to believe a thing

may happen; and yet there be both the right and the duty to avoid and struggle against, to prevent the impending possible calamity. There could be no better illustration of this than the case in hand. The account of the Capital Bank with the Chemical was overdrawn. It had received large accommodations from the Chemical. Being indebted to it was a sufficient reason and justification for the remittances. But the Capital, at the same time, *and up to and including the day of closing, was drawing against the Chemical* a great many drafts, some of them in considerable sums. These were for further advances. What is the inference from this conduct? Simply an intent to continue business. The remittances were not *preferences.* They were *payments on account,* on an indebtedness already existing, and if made also to *maintain credit* and in the hope of further advances, yet a *mistake of plan* or calculation, a *failure to accomplish* the desired end, is not an offense against the statute. There must be not only the "contemplation," but the "intent to prefer" *an existing creditor.*

IV.

The complainant, in the case against Williams and Dodd, as shareholders, to recover dividends, sought to recover all that had ever been paid to them, and in the attempt to sustain that claim took proof to show the condition of the Capital Bank almost from the beginning. Thus at page 40 of Record: "Q. So, Mr. Hayden, at the end of the first year the Capital National Bank had about half of its capital stock wiped out by these losses to which you have testified? A. Yes, sir." Assuming this to be true, and that the impairment of capital was never made good, though that fact is not proved, and assuming that the bank was

insolvent through the whole ten years of its existence, and assuming that the law conclusively infers that all payments made by an insolvent national bank were made *with an intent to prefer*, we have a condition of affairs that would make all dealings with any bank, at any time within the Statute of Limitations, depend upon the hazard of its going into the hands of a Receiver at some future time, and the payments being declared invalid, ripped up and ordered to be refunded. And the rule would apply as well to depositors as to corresponding banks which had afforded accommodations. Every depositor is as much a creditor, a lender to the bank, as another bank which makes an advance. Such a liability on the part of creditors to refund money paid to them in the ordinary and regular course of business, is not and cannot be the law. Every payment made to alarmed depositors, the bank hoping to pull through, would have to be refunded if the bank finally suspended under a run upon it. The heading, or syllabus, of Point I., of brief of learned counsel for appellant, is: "*After the Comptroller of the Currency, through his examiner, had taken possession, no creditor could keep anything.*" With the addition, "paid after such possession," or, "paid after the suspension," this would be good law. But under the contention of appellant it is good law just as it stands. "No creditor could keep anything," no matter how long ago paid, upon the subsequent discovery that the bank was insolvent *when* the payment was made. The proposition is too intolerable for discussion.

For the same reason the kind of testimony found at pages 30–[illegible] even if true, is entirely irrelevant. The witness is testifying in 1895 that notes given in 1890, 1891 and 1892 "were worthless at those times." That might be perfectly true, in the light of subsequent events, and yet not known to be true when the notes were taken. And even if it were proved that the officers of the bank knew they were worthless when taken, the fact would

have no tendency to prove an intent to prefer the Chemical Bank in 1893. The evidence, if available for anything, further illustrates the wide difference between a claim, like this, against an *actual creditor for money loaned*, and a claim for the recovery of dividends, upon the ground that they had not been earned; in other words, illustrates the irrelevancy of all the evidence found in the suit of this complainant against stockholders of the Capital Bank.

V.

The last point leads to the further observation that if the evidence establishes any claim against the Chemical Bank, it also establishes claims against so many others, and in such large amounts that the Chemical Bank could not be sued alone, and would not in equity be required to respond alone. The bill of complainant alleges that the Capital Bank conducted the banking business up to the date of its suspension, the closing of its doors on Saturday, January 21, 1893. The stipulation admits the same fact (R., 9). And at page 100 the complainant has put in evidence a tabulated statement (Exhibit 68), showing "a few" who were creditors of the bank continuously from January 10, 1888, to January 21, 1893, when it closed. How many more there were is not stated. These were only "a few." That the schedule is not a full statement is shown by the omission of one depositor of $26,105.80 (R., 65). It is difficult to see the object of this proof on the part of complainant. It shows a bank in good standing, its deposits not diminishing (and upon that point see also abstract of official reports from February, 1891, to December, 1892, Exhibit 59, p. 99 of R.); a bank well and reasonably fit to be trusted and accommo-

dated by other banks. And that the "creditors" named in the Exhibit 68 were *depositors* is shown by the statement. "These accounts were principally book accounts. * * * The tabulated statement (Exhibit 68) *only* refers to book accounts or open accounts. These various individuals shown here on this tabulated statement *kept checking against this account right along at various times * * * checking and depositing*" (R., 64). Without this evidence the Court would judicially know from the allegations of the bill (R., 1-3) and from the stipulation (R., 9), that in "conducting the banking business in the ordinary and usual way" up to the close of business hours on January 21, 1893, it was constantly receiving and paying out deposits, as well as paying creditors who were not depositors, and even discounting paper.

Now, if the evidence shows any claim whatever against the Chemical Bank, it shows an equally valid claim against *all creditors who were paid anything, embracing all depositors who checked against their deposits*, during the period of insolvency, whether that period was long or short, and equity will not tolerate that this defendant, The Chemical Bank, should be singled out and compelled to repay *in full* the sums of money mentioned in the bill. If any claim, or shadow of a claim, is established, which is emphatically denied, then equality being equity, the first principle of equity jurisprudence would require that *all*, that is, *all who had been paid anything whatever while the Capital Bank was insolvent, should contribute ratably to make up a sum sufficient to pay all outstanding debts of the bank at the date of its suspension.* That is, they must contribute to make up any deficiency that remains unpaid, after applying the assets of the bank and the call upon stockholders for the par of their shares. It is true this would lead to a curious result. It would be making all those, including depositors, who had been paid the day of suspension, or one

day or a month or a year or even six years before suspension, to contribute, by *repayment*, enough to make *entirely whole* all those who had the *good fortune* to be creditors or depositors *at the date of failure*. But the theory and the reasoning of the complainant, and not the theory and reasoning of the defendant, must be held responsible for such a unique result. All that is now insisted upon is that if the complainant's evidence shows any right to relief, it is a relief against so many who ought to bear the burden ratably that equity will not allow the defendant to be singled out for a recovery *in toto* instead of *pro rata*, the amount to be ascertained by a general accounting and contribution.

The account between the parties to this suit was an active one, the dealings rapid and numerous. This is fully shown by the proof the complainant has given, the account for the month of January, 1893 (R , 9-19), and the statement or schedule of the numerous drafts of the Capital *not paid* by the Chemical (R., 20-21), and therefore not entering into the account at pages 9-19.

It will be seen from the account that the sums now claimed, amounting to $11,486.39, were all received by the Chemical on January 23 (R., 19) though all were remitted before the Capital Bank had suspended.

VI.

By the stipulation (R., 9) it will be seen that the usual mail time between Lincoln and New York is 50 hours and 45 minutes; between Lincoln and South Omaha, 2 hours and 40 minutes; between South Omaha and New York, 48 hours and 37 minutes; between Lincoln and St. Joseph, 7 hours and 28 minutes; and between St. Joseph and New York, 50 hours and 55 minutes. This is based on

information derived from the P. O. Department, and of course means actual running time from station to station.

If in the case of direct transit from Lincoln to New York we allow only 12 hours for preparation of mail matter, deposit in mail and making up mail at Lincoln, and distribution and delivery at New York, we have two days, 14 hours and 35 minutes as the *business* time between Lincoln and New York, or 62 hours and a half instead of 50 hours and a half.

All of the sums claimed in the bill, $2,935.60, $815.79, $735, $5,000, $2,000, seemed to have been received by the Chemical Bank and placed to the credit of the Capital Bank, on January 23, 1893 (R., 19). The first three sums named were sent direct by the Capital Bank January 19th, 19th and 20th respectively (Exs. R., 22, 115-116).

As to the remittance of $5,000 by the Packer's National Bank from South Omaha, we have their letter of advice (R., 22), dated January 19th, and if we allow but one day for making, mailing, transmission, receiving and acting upon, the order of the Capital to the Packer's to make the remittance to the Chemical, then the order of the Capital could not have been mailed later than the 18th, three days before suspension, and it may have been some days earlier.

And so with the $2,000 remitted by the Schuster Hax from St. Joseph. The letter of advice (fol. R., 22), is dated January 18th, and the direction of the Capital to the Schuster Hax to remit to the Chemical could not have been mailed later than the 17th, four days before suspension, and may have been several days earlier.

These estimates of time are made in view of the contention in the next succeeding point as to when these remittances vested in the Chemical Bank.

And the matter of time is material, not merely upon the question of vesting title, by delivering into

the United States mail, but is equally important upon the question of intent to prefer. The account (R., 9–19) shows that for some time the account of the Capital had been overdrawn. It was still drawing at the date of these remittances now in dispute. It obtained credit for $10,809.32 "discounts" as late as January 14th (R., 18) and apparently for $12,059.40 as late as the 20th (R., 18).

According to a schedule put in evidence by complainants the drafts of the Capital on the Chemical, not paid by the Chemical, amounted to $44,264 66 (R., 20, 21). These were being drawn up to the day of suspension, nine of them being dated the 21st and thirteen on the 20th. Remittances were also being constantly made, among them those now reclaimed by the Receiver. The facts, instead of indicating an intent to prefer, point unerringly to the intent to continue the business of the bank. The intent to prefer is disproved by the fact that if all drafts of the Capital had been paid, the balance in favor of the Chemical would have been increased by $44,264.66, or raised to $57,582.60, instead of $13,317 94. The motive for remittances, aside from the always proper one--of paying or reducing an indebtedness—is found in the fact of the desire to obtain further advances, the desire to preserve credit with the Chemical, the endeavor to pay everybody. An error of judgment on this point must not be construed into an intent to prefer, nor an act of insolvency, nor as payments made with intent to prevent assets from coming to the hands of a receiver. This view receives striking confirmation by an analysis of the schedule of unpaid drafts. By reference to the "date of issue," it will be seen that they range from December 5, 1892, to January 21, 1893, several being on the very day of suspension. By reference to the "date of protest," it is seen that they were nearly all refused payment *on the 23d, or some days afterwards*, each as presented, in strict compliance with the Examiner's telegram, *received*

on the 23d, to pay no more drafts. On this state of facts an argument is based that the Chemical Bank should be compelled to refund *payments* mailed to it *before* the 21st, the day of suspension, and received on the 23d.

VII.

Title vests by deposit in United States mail.

The deposit of the drafts or checks in the post office, to be carried to the Chemical Bank, was such a delivery as to vest title in that bank.

Johnson *vs.* Sharp, 31 Ohio, 611,

where it was held that the deposit of an assignment in the post office, in Missouri, addressed to the assignee in Ohio, passed title to such assignee, from the time of such deposit as against subsequent attaching creditors. To the same effect are

McKinney *vs.* Rhoads, 5 Watts (Pa.), 343.

1 Randolph Com. Paper, Sect. 218.

Kirkman *vs.* Bank, 2 Caldwell (Tenn.), 397.

1 Danl. Neg. Inst., Sect. 67.

Mitchell *vs.* Byrne, 6 Rich. L., 171.

This rule, that deposit in the mails divests the sender of all title, and vests full title in the person to whom the letter is addressed, is so strict and controlling that if it may be inferred from the facts that an agent or debtor had the consent of the principal or the creditor to remit *money* by mail, its loss in the mails, by theft or otherwise, falls upon the person to whom it was thus sent.

Buck *vs.* Chapin, 99 Mass., 594.

Morgan *vs.* Richardson, 13 Allen (Mass.), 410.

Even in criminal prosecutions, where the thing taken from the mail is described as the property of the person to whom it had been sent, but who had never received it, the charge in the indictment is held to be well laid.

United States *vs.* Jackson, 29 Fed. Rep., 503.

United States *vs.* Jones, 31 Fed. Rep., 725.

In a late Wisconsin case it was held that a bank which, at its customer's request, mails its own draft to the customer's creditor in payment of the creditor's draft on him, cannot defeat the creditor's right to the bank's draft, by intercepting it in the mail, although it extended credit for the amount of the draft to its customer in ignorance of the fact that he was insolvent.

Canterberry *vs.* Bank, 30 Law Rep., Annotated, 845.

In that case the bank succeeded, by the use of the long-distance telephone, in recovering its letter and draft before they were delivered, and destroyed them; but the payee, to whom the draft was addressed through the mails, and who had never received it, succeeded in his action against the bank for the amount of the draft; and this, upon the principle that title vested in him the moment the letter contained in the draft was deposited in the post office.

In Pratt *vs.* Foote, 9 N. Y., 463, a bank's debtor offered, in payment of his note, nearly due, a check drawn upon the bank by one of its own customers; the bank declined to accept the check as payment, but consented to retain it and apply it to the note, if the check were made good on the day the note fell due. On that day a balance appeared against the drawer of the check; but soon after, new credits having been made to him, the bank charged the check in his account, and credited

the note as paid. This transaction was held to operate as an absolute payment of the note. The Court held that such entries upon the books of the bank were of precisely the same effect as if the money was first paid to the payee of the check, and instantly repaid to the bank.

By a parity of reasoning, when the Capital National Bank in Nebraska sent an order by mail to a distant correspondent, to remit to the Chemical Bank, for credit and account of the Capital, and such correspondent did so remit by mail and the Chemical Bank received such remittance and placed it to the credit of the Capital Bank, the transaction is the same as if the correspondent, *on the date of the order*, had paid the cash to the Capital, and the Capital had instantly paid it to the Chemical.

VIII.

An important case, directly in point, has been decided by the Michigan Supreme Court, since the decision of the Circuit Court in this case. The statute of Michigan, upon which the plaintiff sought to recover, is substantially the same as that of New York and of Section 5242 of U. S. Rev. Stats.:

"All payment of money, either after the commission of an act of insolvency or in contemplation thereof, with a view to prevent application of its assets in the manner prescribed in this act, or with the view to a preference of one creditor over another, shall be held to be null and void."

The Receiver of a broken savings bank sued a depositor to recover the amount paid him. The Judges of the Supreme Court delivered separate opinions. Judge Moore said: "Not only must there be an act of insolvency, or a contemplation of

insolvency, but the payment must be made with a view to prevent the application of the assets of the bank in the manner provided by the act, or the payment must be made with a view to the preference of one creditor over another" (p. 677).

Judge Grant said: "The record shows no refusal to pay any depositor who presented a check. Mr. Bradley (the cashier) did no more than to urge certain depositors to withhold their demands" (p. 678). There is no proof that the Capital Bank ever failed to pay a check, and none *that it urged any depositor to withhold his demands.*

"It is not sufficient that the payment *did operate as a preference.* There must be the actual commission of an act of insolvency, or the payment must be made in contemplation of insolvency, or with the intent to prefer" (p. 678).

Judge Hooker said: "We may reasonably say that the words 'with a view to' mean with the intent or design of pursuing a particular course, and that this intent or design means the intent of the bank or officers making the payment, and not the recipient of the payment" (p. 678). The learned Judge then states the argument of plaintiff's counsel that the conduct of the cashier during the run on the bank, paying some and pursuading others to withhold their demands, and finally closing the doors of the bank when he found that he could not stem the tide, had the effect to prevent the application of the assets of the bank in the manner prescribed by law, and to prefer such creditors as were paid to those who were not; that the cashier necessarily knew this; and that it necessarily follows that the payments were made with such intent or view, and consequently the payment was recoverable under the statute. After pointing out that such reasoning would invalidate every payment subsequently made, no matter how long a period intervened between such refusal and closing of the bank's doors, even if the bank had pulled through and continued in business, the Judge points out this curious result: "A man

who was turning over a small capital by depositing daily and drawing in the course of his business might become liable to the bank for an amount several times as large as the sum that he was actually using in his business" (p. 679). The case was a much stronger one for the plaintiff than the case at bar, for there was a heavy run on the bank, and persuasion was used to induce depositors not to urge their demands; elements absent from the case in hand, with the additional fact in this case that the Capital Bank actually went on *paying depositors for four days and more after the remittances had been made to the Chemical Bank.*

Judge Hooker, in the case cited, adds: "It must at least appear that there was a specific design to accomplish one of the objects mentioned, viz, to favor a particular creditor, or to withdraw its funds from the control of the law, and that it is not enough that we shall be able to say that the effect of the act was to prefer the creditor, or to so withdraw the amount paid—facts which are in themselves *incidental and self-evident*" (p. 679).

Stone *v.* Jenison, 36 Law Rep., Ann., 675.

So, an insolvent corporation, by mortgaging its property to raise money to pay its debts does not create any illegal preference.

Jones on Corporations, § 23.

Bergen *v.* Porpoise Fishing Co, 42 N. J. Eq., 397.

IX.

The learned counsel for appellant assumes that the Examiner's telegram to the appellee was received before the close of business on the 23d January. The point is immaterial.

The only account we have of the telegram is at R. 114. It requested the Chemical "not to pay any drafts." And Mr. Quinlan was of the impression that it "did not state when the Capital National Bank suspended, nor when the Bank Examiner took charge of it."

Presumably the Examiner made his information and his directions as full as he desired them to be, as full as would be useful and as full as his legal duty required. He directed that *no more drafts be paid*. But the Examiner makes no objection to, or reclamation of, *previous remittances to the Chemical*, which were before his eyes on the books.

Counsel for appellant contends that: "If the checks had been deposited in the mail *pursuant to any agreement* * * * the case would be very different." The proof shows, and the Court will judicially know, that the mail was the accustomed means of communication between the two banks. That accustomed course of business amounted to an agreement that payments might be so remitted. Therefore, upon concession of counsel for appellant, title passed upon deposit in the mail.

The attempt to divide the Chemical Bank into two characters, one of *agency* and one of *creditor*, is wholly futile. The Capital was constantly indebted to the Chemical. All remittances were sent to it as payments. The deposits were simply entered on the credit side of the account. No instance is shown of *collection and remittance* by the Chemical. It frequently extended credit, and that credit was drawn against by the Capital. The suggestion that: "What the Capital could do the Bank Examiner of course could do, and the law has done it for him as a consequence of his taking possession," is open to several answers. (1.) It assumes the right of a remitting bank to intercept or withdraw the remittance after deposit in the mail. No such right exists (Canterberry *vs.* Bank, 30 Law Rep., Ann., 845). (2.) That "the law has done it for him as a conse-

quence of his taking possession," is begging the whole question. The law put under the control of the Examiner, and vested in the Receiver, whatever had not been lawfully disposed of. The question here is, Were *all* previous payments *void?*

X.

The suggestion that the item of $833.64 should be allowed, because "there is not a particle of proof that it came by mail," would leave a strong implication that those which did come by mail should *not* be allowed to complainant. As no other means of transmission has been shown, and constant remissions by mail are shown, this one will be presumed to have been by mail until the contrary is shown. The complainant had access to the books of account, and letter press copies of the suspended Capital Bank, and cross examined the cashier of the Chemical, and made no attempt to prove any other mode of transmission of the item of $833.64.

The bill is for the recovery of specific items named *and makes no mention of this item of $833.64.*

The brief of counsel for appellant assumes that this item of $833.64, should be allowed because the Chemical Bank has not proved how and when it was remitted. The account shows it was received and placed to credit of the Capital on the 24th (R., 19), three days after suspension, two days after the Examiner took possession. We submit that the burden is on the appellant to show his title to the money. And that burden is increased, if possible, by the frame of his bill. He specifies distinctly five several, separate sums which he claims (Par. VI. of Bill, R., 3). No mention is made of the item of $833.64. No better plan could have been devised to throw the defendant off its guard, if the burden be

on the defendant to prove title to money in its possession.

The complainant must prove his title to that, as to all other sums claimed. He has given not a word of direct evidence on the subject. He simply finds the item on an account rendered by the Chemical to the Capital Bank, and puts that account in evidence and claims the money, because the Chemical has not shown when, how, and by whom it was remitted.

The record shows remittances by letter (R., 22, 115-116). The Court would, without proof, judicially know that the mail is the accustomed mode of correspondence and transmission between banks. The record shows that the Capital frequently ordered other banks to remit to the Chemical. Thus nearly all the *credits* on pages 17, 18 and 19 of the Record show remittance by banks other than the Capital. As this required an order or direction from the Capital, the time between the order and the receipt by the Chemical would be more than three days. This would, of course, require more time than a direct remittance from the Capital. The record shows that three days is the shortest business time between Lincoln and New York. At pages 20-21 there is a list of 66 drafts of the Capital not paid by the Chemical. Each has a "date of issue" in one column, and a "date of protest," on another column. The dates show that nearly every one of these protests were made in obedience to the Examiner's telegram received on the 23d. It must be borne in mind that the Capital Bank suspended at the close of business hours on Saturday 21st. Examiner took possession on Sunday 22d. Monday was 23d. Appellant's brief states that "before the close of business on the 23d the appellee was informed by telegraph by the Bank Examiner that he was in possession of the concerns of the Capital Bank, and that it, the appellee, *must pay no more drafts*." Mr. Quinlan, cashier of Chemical, says the telegram was received "before leaving the

bank on Monday, January 23d " (R., 114), a form of expression indicating after business hours. The order was to pay no more drafts. Placing to credit of the Capital, on the 24th, a remittance mailed by the Capital, or some of its correspondence, some days before the 21st, was not paying a draft.

Now recurring to the schedule of protested drafts, it is found that with the single exception of the request for further advances, they were protested on dates varying from January 23d to March 27th. By comparing the dates of protest with the dates of issue, it is seen that *only five* out of the 66 were protested on the *third day after issue.* Most of the others range from four to seven days after issue, a few of them being several weeks after.

The complainant thus, by his own exhibits, proves that *three days is the very shortest business* time between Lincoln and New York, and that it is usually much longer.

If the Capital remitted the $833.64 direct, on the morning of the 21st, the day it suspended, but while in full operation, the Chemical could not have received it earlier than the 24th. But if remitted by some other bank, at the request of the Capital as in so many other cases, such order was given by the Capital some days *before* the 21st. And title vested on mailing such order.

Therefore the complaint has shown that the item of $833.64 was not remitted *after* the 21st, for had it been remitted after that date it could not have reached the Chemical on the 24th. So that in any event it was remitted before the Capital closed. But the complainant has shown that the probabilities are very great, that the money was remitted *some days earlier than the 21st.*

The presumption is that it was sent by mail, like all the others. If it was not, and if there was anything in the manner of its sending that would favor the complainant, he is presumed to know it and has not divulged the facts. The frame of his bill failed

to attract attention to it, and diverted attention from it; and now he wants the money because the exact manner and time of transmission have not been shown by the defendants. He simply asks a decree from it, based upon a guess that it was remitted after suspension. That is shown to have been impossible, and the appellant has failed to prove any title to it.

XI.

In the recent case of *Merrill, Receiver*, v. *First National Bank of Palatka*, Nos. 54 and 55, October Term, 1898, this Court has held that a secured creditor may prove his whole debt without deducting collaterals; that in settling the affairs of an insolvent national bank the right of set-off exists, and "took effect as of the date of the declaration of insolvency"; that "the creditors' rights in the trust fund are established when the fund is created," and "that which at the time of the insolvency belongs of right to the debtor does not belong to the bank," and that "the claims of creditors are to be determined as of the date of the declaration of insolvency." All these rules support the contention of appellee. There was no definite act of insolvency or act of bankruptcy by the Capital Bank unless the closing of its doors at the close of business hours on the 21st may be called such. The possession of the Examiner on the 22d was a declaration by him that the bank was insolvent on that day. It was a declaration to others when the advice was received. The Chemical Bank received that information on the 23d. If legal rights related back to either the 21st or the 22d, then on either of those days the money sued for did not belong to the bank; it had pre-

viously been remitted to the Chemical Bank, in the usual course of business, and before any "act" or "declaration" of insolvency. The title had vested in the Chemical by the act of mailing the remittances. Treating the question either as one of payment in the usual course, or under the right of set-off, the decree below should be affirmed.

NEW YORK, March, 1899.

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